



Billing Code 4910-60-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2014-0003 (PDA-37(R))]

New York City Permit Requirements for
Transportation of Certain Hazardous Materials

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Public notice and invitation to comment.

SUMMARY: Interested parties are invited to comment on an application by the American Trucking Associations, Inc. (ATA) for an administrative determination whether Federal hazardous material transportation law preempts requirements of the New York City Fire Department for a permit to transport certain hazardous materials by motor vehicle through New York City, or for transshipment from New York City, and the fee for the permit.

DATES: Comments received on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] and rebuttal comments received on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered before an administrative determination is issued by PHMSA's Chief Counsel. Rebuttal comments may discuss only those issues

raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: ATA's application and all comments received may be reviewed in the Docket Operations Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590. The application and all comments are available on the U.S. Government Regulations.gov website: <http://www.regulations.gov>.

Comments must refer to Docket No. PHMSA-2014-0003 and may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 1-202-493-2251.
- *Mail:* Docket Operations Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590.
- *Hand Delivery:* Docket Operations Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

A copy of each comment must also be sent to (1) Boyd Stephenson, Director, Hazardous Materials & Licensing Policy, American Trucking Associations, 950 Glebe Road, Suite 210, Arlington, VA 22203, and (2) Salvatore J. Cassano, Commissioner,

New York City Fire Department, 9 Metrotech Center, New York, NY 11201. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: “I certify that copies of this comment have been sent to ATA and the New York City Fire Department at the addresses specified in the Federal Register.”)

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing a comment submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477-78), or you may visit <http://www.regulations.gov>.

A subject matter index of hazardous materials preemption cases, including a listing of all inconsistency rulings (IRs) and preemption determinations (PDs), is available through PHMSA’s home page at <http://phmsa.dot.gov>. From the home page, click on “Regulations,” then on “Preemption of State and Local Laws” (in the “Hazmat Safety” column). A paper copy of the index will be provided at no cost upon request to Mr. Hilder or Mr. Lopez, at the address and telephone number set forth in FOR FURTHER INFORMATION CONTACT below.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder or Vincent Lopez,
Office of Chief Counsel (PHC-10), Pipeline and Hazardous Materials Safety
Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE,
Washington, DC 20590; telephone No. 202-366-4400; facsimile No. 202-366-7041.

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

ATA has applied to PHMSA for a determination whether Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, preempts the provisions in Section 2702-02 of Title 3 of the Rules of the City of New York which allow “motor vehicles for which a permit has been issued” to transport

flammable liquids, combustible liquids, compressed gases, and explosives, including fireworks in interstate and intrastate commerce, through the city without pickup or delivery, and with respect to deliveries of such materials to wharfs or piers, airports and shipping terminals for transshipment out of the city . . . *without conforming to the routing, time, escort and other requirements of this section.*¹

ATA states that motor carriers “must file a separate application for each tractor or trailer,” and pay a \$210 fee “for each tractor or trailer to be inspected, and, if approved, must be ready to present copies of the permit to enforcement officials at their request.”² The copy of the permit form provided by ATA contains spaces for the truck and trailer numbers and the date of inspection of the vehicle or trailer, and also indicates that the “Permit expires (1) one year from the above date” and “This letter shall be carried in the cab of the truck and it shall be presented upon request to Fire Department representative.”

In summary, ATA contends that the:

¹ Section 2707-02(a), (b)(2) (emphasis supplied; other italics omitted). Small arms ammunition and paints, varnishes, and other paint products are “not subject to this section.” The “other requirements of this section” include (a) prohibitions against fueling the motor vehicle in the City, or parking, standing, or transferring hazardous material from one container or vehicle to another except in the case of emergency, and (b) requirements to avoid congested areas and notify the Fire and Police Departments in the event of a breakdown or collision.

ATA has also applied for a determination whether Federal hazardous material transportation law preempts permit and fee requirements of Pittsburgh, Pennsylvania. *See* Docket No. PHMSA-2014-0002 (PDA-36(R)).

² ATA states that the “\$210 fee to inspect each tractor or trailer” is “far above the prevailing norm” and that “[o]ther hazardous materials transportation permits cost significantly less. For instance, the entire state of California mandates only \$100 per motor carrier.”

City of New York's regulatory regime is deficient in several ways. Only motor carriers are required to obtain City of New York's permit, which imposes an unfair burden on a single mode of transportation. The permit requirements apply only to some carriers and impedes their drivers' ability to comply with 49 CFR 177.800(d), which mandates that "hazardous materials must be transported without unnecessary delay." Finally, City of New York cannot show that it is using funds generated from its permit fees for hazardous materials enforcement and emergency response training.

II. Federal Preemption

Section 5125 of Title 49, United States Code (U.S.C.), contains express preemption provisions relevant to this proceeding. Subsection (a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted -- unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under § 5125(e) -- if:

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.³

Subsection (b)(1) of 49 U.S.C. 5125 provides that a non-Federal requirement concerning any of the following subjects is preempted -- unless authorized by another Federal law or DOT grants a waiver of preemption -- when the non-Federal requirement

³ These two paragraphs set forth the "dual compliance" and "obstacle" criteria that are based on U.S. Supreme Court decisions on preemption. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978). PHMSA's predecessor agency, the Research and Special Programs Administration, applied these criteria in issuing inconsistency rulings under the original preemption provisions in Section 112(a) of the Hazardous Materials Transportation Act (HMTA), Public Law 93-633, 88 Stat. 2161 (Jan. 3, 1975).

is not "substantively the same as" a provision of Federal hazardous material transportation law, a regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Department of Homeland Security:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material.⁴

In addition, 49 U.S.C. 5125(f)(1) provides that a State, political subdivision, or Indian tribe "may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response."⁵

The preemption provisions in 49 U.S.C. 5125 reflect Congress's long-standing view that a single body of uniform Federal regulations promotes safety (including security) in the transportation of hazardous materials. Some forty years ago, when

⁴ To be "substantively the same," the non-Federal requirement must conform "in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d).

⁵ See also 49 U.S.C. 5125(c) containing standards which apply to preemption of non-Federal requirements on highway routes over which hazardous materials may or may not be transported.

considering the HMTA, the Senate Commerce Committee "endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). A United States Court of Appeals has found uniformity was the "linchpin" in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

III. Preemption Determinations

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to PHMSA to make determinations of preemption, except for those concerning highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.97(b).

Section 5125(d)(1) requires notice of an application for a preemption determination to be published in the Federal Register. Following the receipt and consideration of written comments, PHMSA publishes its determination in the Federal Register. See 49 CFR 107.209(c). A short period of time is allowed for filing of petitions for reconsideration. 49 CFR 107.211. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in

which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, or whether a fee is “fair” within the meaning of 49 U.S.C. 5125(f)(1). A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n v. Harmon*, above, 951 F.2d at 1581 n.10. In addition, PHMSA does not generally consider issues regarding the proper application or interpretation of a non-Federal regulation, but rather how such requirements are actually “applied or enforced.” Rather, “isolated instances of improper enforcement (e.g., misinterpretation of regulations) do not render such provisions inconsistent” with Federal hazardous material transportation law, but are more appropriately addressed in the appropriate State or local forum. PD-14(R), Houston, Texas, Fire Code Requirements on the Storage, Transportation, and Handling of Hazardous Materials, 63 FR 67506, 67510 n.4 (Dec. 7, 1998), decision on petition for reconsideration, 64 FR 33949 (June 24, 1999), quoting from IR-31, Louisiana Statutes and Regulations on Hazardous Materials Transportation, 55 FR 25572, 25584 (June 21, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992), and PD-4 (R), California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids, 58 FR 48940 (Sept. 20, 1993), decision on reconsideration, 60 FR 8800 (Feb. 15, 1995).

In making preemption determinations under 49 U.S.C. 5125(d), PHMSA is guided by the principles and policies set forth in Executive Order No. 13132, entitled "Federalism" (64 FR 43255 (Aug. 10, 1999)), and the President's May 20, 2009 memorandum on "Preemption" (74 FR 24693 (May 22, 2009)). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. The President's May 20, 2009 memorandum sets forth the policy "that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Section 5125 contains express preemption provisions, which PHMSA has implemented through its regulations.

IV. Public Comments

All comments should be directed to whether 49 U.S.C. 5125 preempts the City of New York's requirements for a permit for transporting these hazardous materials by motor vehicle through the City, or for transshipment from the City, and the fee for obtaining the permit. Comments should specifically address the preemption criteria discussed in Part II above and set forth in detail the manner in which these requirements are applied and enforced, including:

- any requirements or conditions for issuance of a permit, other than completion of the application form, payment of the permit fee, and inspection of the tractor or trailer;

- the amount of time taken by the City to conduct the inspection and issue a permit;
and
- for each of the past three calendar (or fiscal) years, the total amount of permit fees collected by the City and all purposes for which these fees have been used (including an identification of the specific accounts into which the permit fees were deposited).

Issued in Washington, DC on April 11, 2014.

Vanessa L. Allen Sutherland,
Chief Counsel.

[FR Doc. 2014-08691 Filed 04/16/2014 at 8:45 am; Publication Date: 04/17/2014]